



U.S. Citizenship
and Immigration
Services

B-4

FILE:

Office: CALIFORNIA SERVICE CENTER

Date: JUL 7 2004

IN RE:

Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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DISCUSSION: The Director, Vermont Service Center¹ approved the employment-based petition on July 31, 2000. Subsequently, the beneficiary applied for adjustment of status in California. On the basis of new information received and on further review of the record, the Director, California Service Center determined that the petitioner was not eligible for approval of the employment-based petition. Accordingly, the director properly served the petitioner with Notice of Intent to Revoke the approval of the preference visa petition, and his reasons therefore, and ultimately denied the petition on August 26, 2003. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of Delaware in September 1993. It manufactures and distributes chemical products. It seeks to employ the beneficiary as its market development manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director initially approved the employment-based petition. The beneficiary applied to adjust status on September 21, 2000. The director requested further evidence in connection with the beneficiary's application to adjust status in December 2001. Upon review of the evidence received in response to the request for further evidence, the director issued a Notice of Intent to Revoke the approval. The director ultimately revoked approval, determining that the petitioner had not established that the beneficiary's assignment would be primarily managerial or executive.

On appeal, counsel for the petitioner asserts that the petitioner has met its burden of proof and has established eligibility for the benefit sought.

Section 203(b) of the Act states in pertinent part:

- (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

- (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United

¹ The petitioner filed the petition with the Vermont Service Center as the petitioner's principal office is located in the State of New Jersey. However, the beneficiary's position is located in California in one of the petitioner's sales and marketing offices in the United States. The Director, California Service Center assumed jurisdiction of the beneficiary's adjustment of status application, discovered the error in approving the immigrant employment-based petition, and began these revocation proceedings.

States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. See 8 C.F.R. § 204.5(j)(5).

Section 205 of the Act, 8 U.S.C. 1155, states: "The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The issue in this proceeding is whether the petitioner established that the beneficiary's assignment would be in a primarily managerial capacity. The petitioner claims that the beneficiary is a functional manager and does not claim that his duties are executive.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily

- i. manages the organization, or a department, subdivision, function, or component of the organization;
- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- iv. exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

In a letter submitted with the petition, the petitioner stated that the beneficiary had been "assigned to perform an essential function, the marketing development and sales programs in the United States with special focus on the Western Regions." The petitioner added that the essential functions the beneficiary managed included:

- [D]eveloping and implementation of marketing and sales programs;
- [C]onducting management studies, collecting and interpreting economic and statistical data;
- [P]reparing of budgets and forecasting of future market needs;
- [C]oordinat[ing] major customer/account activities with managerial and supervisory staff in other divisions to ensure customer needs and specifications are met;
- [D]eveloping, hiring and training new sales and marketing staff and management of them.

The petitioner also provided a job description outlining the dimensions of the beneficiary's position as:

The West Coast Market Development Manager will be responsible for statistical market research, conducting market studies, establishing customer relations, determining market product requirements, [and] developing markets resulting in growth and expansion for [the petitioner].

The director approved the petition based on this job description.

In response to a request for further evidence in connection with the beneficiary's application to adjust status, the petitioner indicated that the beneficiary's primary job responsibility in California "is to develop and enhance our Western Regional markets for our Company's exclusive products manufactured in our manufacturing facilities." The petitioner added:

In that regard, his job tasks involve extensive travel within the Western Region, such as California, Arizona, Nevada, and even Mexico, to meet with distributors and agents and industry-related associates for discussions and negotiation of contract terms and conditions. Aside from his travels and time spent with our main office in New Jersey, [the beneficiary] also manages the sales and marketing functions performed by our Western Region sales staff primarily through electronic communications as well as in person. We have sales personnel in almost every State managed by our four Regional Managers, with [the beneficiary] being the market Development Manager for the Western Region.

The petitioner submitted an organizational chart showing the beneficiary with three subordinates providing "sales." The petitioner noted that the beneficiary's three subordinates "perform the sales and marketing function" according to instructions given by the beneficiary. The petitioner added that it had approximately 350 customer accounts in the Western Region and that these accounts were assigned to the three sales and marketing staff and managed by the beneficiary. The petitioner noted that the three sales and marketing staff were contractors and were issued Internal Revenue Service (IRS) Forms 1099, Miscellaneous Income. The petitioner reiterated that the beneficiary had been approved as a function manager and that the beneficiary did not and would not perform the day-to-day sales and marketing function which had been and would be performed by the sales and marketing staff.

In the Notice of Intent to Revoke, the director determined that the beneficiary would not qualify as a manager because he did not manage other managers or professional employees. The director also determined that because the beneficiary worked from his home, traveled extensively, and met with distributors, agents, and industry-related associates, the beneficiary would be performing the routine operational activities of the entity.

The director noted that the beneficiary supervised outside contractors and determined that contractors could not be considered the petitioner's employees. The director inexplicably concluded that because the beneficiary did not supervise "employees," the beneficiary would be performing the petitioner's functions, as he had no subordinate employees to relieve him from performing non-qualifying duties.

In rebuttal, counsel for the petitioner agrees that the beneficiary is not a second level manager and that he does not manage professionals. Counsel asserts that the beneficiary is a function manager. Counsel contends that the outside contractors perform the function the beneficiary manages. Counsel claims that the beneficiary's three subordinates perform the day-to-day sales and marketing activities. The petitioner provided a 2000 and 2001 IRS Form 1099, issued to one individual and the individual's January 1, 1995 agreement with the petitioner to sell the petitioner's product and service accounts in a defined territory. The petitioner also provided a 2001 IRS Form 1099, issued to a second individual and the individual's May 1, 2001 agreement to act as the petitioner's sales agent for the California territory. Counsel explains that a third subordinate contractor had left the company and that the petitioner was seeking a replacement.

Counsel asserted that the sales and product marketing is an important and essential function. Counsel asserts that the beneficiary's duties involve significant management of the function while the beneficiary's subordinates perform only the sales and marketing duties. Counsel further differentiates the duties of the beneficiary and his subordinates by claiming that only the beneficiary discusses and negotiates contract terms and conditions, authority given only to senior sales and marketing management staff.

In a poorly written decision, the director continued to conclude that since contractors are not employees, the beneficiary had no subordinates. The director determined that the petitioner had not shown that the beneficiary managed or directed the management of a department, subdivision, function, or component of the petitioner organization. As support for this conclusion, the director states: "Given that the beneficiary has no employee under his direction and the beneficiary performs the work of administration since no other employee in his home to assist in performing the administrative duties and other various type of electronics

communications, or travel to various States in order to negotiation of contract, etc., which prevent the beneficiary to perform as a function manager as claimed by the petitioner.” The director again concluded that the beneficiary is involved in the performance of routine operational activities of the entity rather than in the management of a function of the business.

On appeal, counsel for the petitioner states that the petitioner sought to qualify the beneficiary as a “functional manager;” thus whether the beneficiary supervised employees is immaterial. Counsel asserts that the key consideration in this matter is whether the beneficiary supervised a function that was performed by others. Counsel asserts that the regional sales staff’s job descriptions show that the regional sales staff relieves the beneficiary from the day-to-day sales and marketing activities. Counsel contends that the AAO has concluded in past decisions that the use of outside contractors can satisfy the requirement that a beneficiary must work through other employees. Counsel cites an unpublished decision in support of this contention.

Counsel also claims that the director improperly assumed that the beneficiary performed administrative work and did not provide the petitioner an opportunity to provide evidence to the contrary. Counsel refers to the petitioner’s organizational chart previously submitted which shows that the petitioner has an operational administration department. Counsel asserts that the supervisory and support workers within this department perform the daily administrative activities for the products sales and marketing function. Counsel claims that all the petitioner’s regional managers use the head office’s administration staff. Counsel also provides copies of invoices, orders, and shipping documents prepared and sent out from the petitioner’s New Jersey head office.

Counsel concludes by again asserting that the three regional sales contractors perform the daily sales and marketing of the product, prepare the sales and business transition reports, and travel throughout the assigned territories to demonstrate products and take orders. Counsel asserts that the beneficiary’s travels were only for the purpose of finalizing contracts and to resolve major pricing or product issues with customers.

Counsel’s assertions are not persuasive. The petitioner claims that the beneficiary’s position is a functional manager position. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner’s description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The petitioner first indicated that the beneficiary developed marketing and sales programs, conducted management studies, prepared budgets, coordinated major customer/account activities, and developed, hired and trained new staff. The petitioner also provided a job description for the beneficiary’s position. The position description focused on duties involving market research, customer relations, and determining product requirements and developing a market. The initial descriptions suggest that the individual in this position would be providing the petitioner’s market research, developing a market for the petitioner’s products, coordinating customer accounts and establishing customer relations. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

In response to the director’s request for evidence, the petitioner indicated that the beneficiary’s job involved “extensive travel” within the region to meet with distributors and agents and to negotiate and sign contracts.

In addition to these tasks, the petitioner noted that the beneficiary was also responsible for managing the sales and marketing functions performed by the sales staff.

Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that the beneficiary's duties are "primarily" managerial. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties and states that the beneficiary is a function manager, but the petitioner fails to quantify the time the beneficiary spends on managerial functions. This failure of documentation is important because the description of the beneficiary's duties includes market research, customer relations, extensive travel to meet with agents and distributors and other tasks that do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Moreover in rebuttal, counsel for the petitioner stresses that the beneficiary is managing the sales and product marketing function through the work of three contracted sales staff. However, the petitioner has provided documentary evidence showing the use of only one contractor, when the petition was filed. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Counsel's assertion that only the beneficiary has authority to discuss and negotiate contracts does not elevate the beneficiary to a managerial position but is only evidence of the trust reserved for a staff employee rather than contract workers. In addition, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

On appeal, counsel does not provide further documentary evidence to substantiate that a regional sales staff relieves the beneficiary from the day-to-day sales and marketing activities. Counsel correctly observes that the use of outside contractors can satisfy the requirement that a beneficiary is working through other employees. Counsel should note, however, that citing unpublished decisions carries little probative value. Unpublished decisions are not binding on CIS in its administration of the Act. See 8 C.F.R. § 103.3(c). Further, when the petition was filed, the beneficiary was servicing 350 accounts with the help of only one contracted worker. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel's assertion on appeal that the beneficiary's travels were only for the purpose of finalizing contracts and to resolve major pricing or product issues with customers elaborates on the petitioner's earlier view that the beneficiary is required to travel extensively to discuss, negotiate, and resolve customer problems. Again, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, *supra*; *Matter of Ramirez-Sanchez*, *supra*. In the initial version of the beneficiary's position, the beneficiary appears to do more of the actual work, while the second iteration of the job has the beneficiary managing more of the actual work done in the petitioner's operation. A petitioner may

not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Finally, the term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). Although the petitioner in this matter has identified the function as the sales and product marketing function, the petitioner has not articulated the essential nature of the function,² and has not established the proportion of the beneficiary's daily duties attributed to managing the essential function. Further, the petitioner has not provided documentary evidence demonstrating that the beneficiary was and would be relieved of performing the duties relating to the function. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Counsel's assertion on appeal that the director did not give any notice he would question who performed the petitioner's administrative duties is without merit. In the instant matter, the petitioner is granted an automatic right to appeal the decision of the service center. *See* 8 C.F.R. § 103.3. Therefore, the petitioner is given an opportunity to establish eligibility in the appropriate forum, that being the AAO. The fact that the director did not indicate in the request for additional evidence that he would later address this issue in the revocation decision in no way precludes the petitioner from establishing eligibility for the desired immigration benefit.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

² Counsel's assertion that the sales and product marketing function is an important and essential function is not sufficient to establish the essential nature of the function. The assertions of counsel do not constitute evidence. *See Matter of Obaigbena, supra; Matter of Ramirez-Sanchez, supra*. The petitioner must describe the value of the function and the importance in relation to the product or service provided in order to establish the essential nature of the function.